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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 558

JAMES M. PENNINGTON, ET AL,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. .....

JAMES M. PENNINGTON,
RALPH E. PHILLIPS and
LILLIAN GOAD PHILLIPS,
Administratrix of the Estate
of Burse Phillips, deceased,
t/a Phillips Brothers Coal Company
HARRY P. STANSBERRY, individually
and t/a Stansberry Coal Company,
JESSE C. FESLER and
NOLA FESLER, individually
and t/a Fesler Coal Company
U. R. ARNOLD and
MRS. U. R. ARNOLD, individually
and t/a Arnold Mining Company, and
ARNOLD COAL COMPANY, INC.,
TENNCO, INC.,
E. C. McPHERSON, individually
and t/a McPherson Coal Company,
DEAN COAL COMPANY, and
W. R. PARTON, d/b/a
W. R. PARTON COAL COMPANY,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, James M. Pennington, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 11, 1968, in Case Nos. 17,445, 17,446, 17,447, 17,448, 17,449, 17,450, 17,451 styled as in the opinion of said Court copied in Appendix A hereinafter, wherein the Sixth Circuit affirmed judgments of the United States District Court for the Eastern District of Tennessee, Northern Division, entered August 1, 1966, against petitioners dismissing their claims against respondent, United Mine Workers of America (herein called "UMW" or "the union"), after a trial without a jury.

An agreed and certified record, consisting of the joint appendix filed in the Court of Appeals and the proceedings in the Court of Appeals, is furnished herewith, in accordance with Rule 21 of this Court.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A hereto, pages 1 - 28. It is contained in the certified record, but is not yet printed in official reports. The opinion of the District Court is reported in 257 F. Supp. 815 and is contained in the certified record (138a-253a).

JURISDICTIONAL GROUNDS

This Court's jurisdiction is invoked under 28 USC, Sections 1254(1) and 2101(c). The judgment of the Court of Appeals was dated and entered September 11, 1968.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The claims of petitioners against UMW are founded on the Sherman Act, and jurisdiction of the District Court was invoked under 15 USCA 15.

QUESTIONS PRESENTED

1. Did the lower courts comply with the mandate of this Court after the first appeal, the lower courts having rejected the most crucial language of the controlling opinions of this Court as being inconsistent with certain general and preliminary statements made in those opinions?

2. Did the union by the clear terms of the "Protective Wage Clause" of the 1958 amendment to the National Bituminous Coal Wage Agreement, only a small part of which was before this Court on the first appeal, submit to such restraints upon its bargaining freedom in the various units of the industry as to violate the Sherman Act, those restraints having been demanded by the major companies with whom the union made the national contracts, and the union, the officers and representatives of all union branches, and smaller companies, being subject to trial by industry tribunals for violations of the restrictive covenants in any of the bargaining units?

3. Is a Sherman Act case to fail because of insufficient proof of the specific intent "to drive small competitors out of business" when it is undisputed that there was the intent to impose terms set by the conspirators on competitors, which terms were manifestly unjustified, unreasonable and concededly impossible to observe for over half the industry?

4. Is a Sherman Act case, based on a national contracting combination of union and business groups, to fail because of the proof of specific intent being held insufficient to satisfy Norris-LaGuardia's "clear proof" rule when there can be no question of authorization, ratification and participation in the industry-wide bargaining?

5. Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects—the growing prosperity of the two largest companies and the deficit position of all the rest of the industry combined, the inevitable and accelerating merger and concentration trend, the blight created in broad areas where conditions make the contract impossible, the loss of jobs of two-thirds of union members from automation made necessary by national contracts with nothing in the contracts to relieve the unemployed, the intensive and often violent efforts of the union to destroy the businesses of non-conforming operators, the waste of vital natural resources in abandonment of all but those areas of mines which can be stripped off the easiest or worked underground with large machines?

STATUTES INVOLVED

The statutory provisions involved are quoted in Appendix B herein and include Sections 1 and 2 of the Sherman Act (15 USCA 1, 2); Sections 4 and 6 of the Clayton Act (15 USCA 15, 17); Section 20 of the Clayton Act (29 USCA 52); Sections 2, 4 and 6 of the Norris-LaGuardia Act (29 USCA 102, 104 and 106); the Labor-Management Relations Act (29 USCA § 141, 151, 157, 158); and the National Employment Act (15 USCA 1021).

STATEMENT OF THE CASE

A. The History of the Litigation

In 1958 seven coal companies in northern Tennessee were sued by the Trustees of United Mine Workers of America Welfare and Retirement Fund to recover money judgments for delinquent royalties as signatories to the National Bituminous Coal Wage Agreement of 1950, as amended. These coal companies filed cross claims against United Mine Workers of America, and an eighth coal company, Dean Coal Company, filed an original action against UMW under the Sherman Antitrust Act, Sections 1 and 2 (15 USC, § 1, 2), alleging that commencing in 1950 UMW engaged in an agreement, combination or conspiracy with major coal companies "to stabilize the prices of coal, to restrain the trade of small coal producers, and to monopolize the bituminous coal industry for the major coal producers," (100a) alleging that the conspiracy called for the imposition of the National Bituminous Coal Wage Agreement of 1950, as it was negotiated and amended from time to time by UMW and the major companies, upon smaller companies such as the petitioners, even though it was obviously impractical and impossible for those companies to observe.

The first of these cases, James M. Pennington, et al., doing business as Phillips Brothers Coal Company, went to trial before a jury in the year 1961. After a verdict in favor of the coal company against the union, the verdict was sustained on the evidence by the Trial Court and the Court of Appeals for the Sixth Circuit (325 F.2d 804). This Court granted certiorari and in June of 1965 this Court reversed the judgment in favor of the coal company and *remanded the case for another trial consistent with the opinion of Mr. Justice White* (381 U.S. 657, 672).

In that opinion (joined in by the Chief Justice and Mr. Justice Brennan) this Court said, among other things:

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, ***without regard to predatory intention or effect in the particular case***. For the salient characteristic of such agreement is that the union surrenders its freedom of action with respect to its bargaining policies .... It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policies." (italics ours)

This opinion was supposed to govern the second trial on the remand (381 U.S. 672).

In a concurring opinion, joined in by Justices Black and Clark, Mr. Justice Douglas held that there is a prima facie evidence of a violation of the Sherman Act in proof of an industry-wide agreement the necessary consequence of which, if carried out, is restraint of interstate commerce (381 U.S. 673).

On the remand, the case of James M. Pennington, et al., and the other cases mentioned above were consolidated for trial by an agreed order, petitioners agreeing that the trial would be without a jury. After the trial District Judge Robert L. Taylor filed a memorandum opinion, reported as Lewis v. Pennington, 257 F. Supp. 815, and found in the record (138a-253a). The Trial Judge held in favor of UMW and entered a Final Judgment on August 1, 1966, ordering the dismissal of the claims against the union in all of these cases, except the two

cases of Dean Coal Company and Parton Coal Company wherein there were alternative common law claims for violence, and judgments were entered against the union on the common law claims in those two cases. (These common law judgments were reversed and sent back for further consideration by the Court of Appeals, and no further mention need be made in this petition concerning those claims.)

With respect to the claims of the Trustees of the Welfare Fund against the seven coal companies, and going back to the first trial of the Pennington case, the jury in that trial returned a verdict against the Trustees holding that they were co-conspirators in the alleged Sherman Act conspiracy. On post-trial motions the Trial Judge set aside that verdict and entered judgment against James M. Pennington, et al., for the amount of the unpaid Welfare Fund royalties. James M. Pennington, et al., appealed that judgment to the Court of Appeals but the Court of Appeals sustained the judgment in favor of the Trustees (325 F.2d 804) and this Court denied Writ of Certiorari (381 U.S. 949). Subsequently, judgments have been entered in favor of the Trustees against these seven companies, or individuals doing business as coal companies, ranging in amount from that against Harry P. Stansberry of $23,347.00 to that against Tennco, Inc. of $169,877.00. Accordingly, the claims of the Trustees are now at rest.

The claims before the Court on this petition are the antitrust claims, all being in the appeal numbered 17,445 in the Court of Appeals. All the other cases, numbered 17,446 through 17,451, involve appeals by the union from the decision of the District Judge to tax costs against the union. The Court of Appeals reversed this decision, and it is the position of petitioners that the decision on these costs appeals should abide the decision on the antitrust claims.

B. The Opinion of the District Court

In deciding the second Pennington case, and in contrast to the above quoted language of Mr. Justice White's controlling opinion and Mr. Justice Douglas' concurring opinion in the first Pennington case, the Trial Court said:

> "Upon careful consideration, the Court has reached the conclusion that the Pennington case teaches that it ***is necessary to find predatory intent to drive small coal operators out of business*** in order to hold the employer and union for a violation of the Sherman Act .... The standard of proof necessary to show predatory intent is governed by the recent decision of the Supreme Court in United Mine Workers of America v. Paul Gibbs (483 U.S. 715)." (167a) (257 F. Supp. 829) (italics ours)

In rejecting the crucial language of Mr. Justice White's opinion, the District Judge said:

> "Justice White's Footnote No. 2 indicates that the antitrust law is not designed to protect marginal operators; that ill effects alone on the marginal operators is not enough to show intent." (167a) (257 F. Supp. 829).

The Court never considered in its opinion the drastic effects throughout the whole industry and areas devoted to coal mining of the practice complained of in this case.

With respect to Mr. Justice Douglas' opinion, the Trial Court indicated that he considered the second paragraph of that opinion inconsistent and contradictory of the first paragraph, and the Trial Court said:

> "It is to be observed that Mr. Justice Douglas under Paragraph 1 stated that if the agreement contained the

two factors mentioned in that paragraph, namely, an industry-wide agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that it was made for the purpose of forcing some employers out of business, both the employer and the union to the agreement would be guilty of violating antitrust law. Yet, in the second sentence, he says that such industry-wide agreement containing those features is only prima facie evidence of a violation of the antitrust laws." (166a) (257 F. Supp. 828).

The Trial Court goes on to dismiss the second paragraph of the concurring opinion of Mr. Justice Douglas as meaningless.

Thus the Trial Court reached the conclusion that predatory intent to drive small coal companies out of business was the essential matter that must be proven, and, further, the Trial Court held that this type of intent must be proved with such certainty as would satisfy the Norris-LaGuardia Sec. 6 "clear proof" rule. Direct evidence was the only thing that would satisfy. Effects and consequences of the course of conduct of the alleged conspirators was not considered material and was not taken into consideration in the reaching of the Court's conclusion that there was not the clarity of proof necessary to establish the required predatory intent.

Laying aside the lengthy verbatim quotations by the opinion of the Trial Court from the statement of theories and oral arguments of each side, and laying aside the long quotations from the arguments of each side about a matter which was a major issue in the first trial but was only a small corner of plaintiff's second case (predatory or discriminatory pricing by union owned companies on the

market supplied by petitioners), and looking at the findings and conclusions of the Court on the central and important issues concerning industry-wide bargaining which was the all important issue in the second trial, ***there is no discussion of this except in two places***. At 231a (257 F. Supp. 859) a short paragraph is given to bargaining that took place in 1950, before the formation of the dominant coal association, Bituminous Coal Operators Association. Then the opinion skips to the 1958 Protective Wage Clause (quoting it in a marginal note but leaving out the important introductory paragraph), considering only a small part of that clause. The clause reads in this part:

> "During the period of this contract, the United Mine workers of America will not enter into, be a party to, nor will it permit any agreement or understanding ***covering any wages, hours or other conditions of work applicable to employees covered by this contract*** on any basis other than those specified in this contract ..." (231a) (257 F. Supp. 859).

The Trial Court refers to this part of the clause as reading:

> "Paragraph A obligates the UMW not to enter into or be a party to any agreement covering wages and working conditions applicable to ***employers covered by the contract*** on any basis other than those specified in the contract." (235a) (257 F. Supp. 862).

We have been completely unsuccessful, after lengthy urging in briefs, to get the lower courts to consider this Protective Wage Clause (including its introductory paragraph) as a whole, or consider who made it and under what circumstances, and the history of bargaining over a period of eight years by two man bargaining teams, and how this clause fitted into that history and into the national

contracts already existing, and the practical construction given, and the potential impact of such a clause as this on an industry the great bulk of which was marginal as proved by the union's own lawyers (1670a-1671a).

The Trial Court gave no other consideration to the proof about industry-wide bargaining than that indicated above. It did not mention any of the direct proof as to motivating intentions (if organizations like unincorporated unions and coal associations can have specific "intentions") such as that found at 1784a-5a, 789a-792a, 812a, 816a-7a.

As to circumstantial proof of intention from effects of the course of conduct of those who made the national contracts, the Trial Court had rejected this approach as stated above.

It was in this frame of reference that the Trial Court was able to say that it did not find "predatory intent to drive small mine operators out of business" with proof clear enough to satisfy Norris-LaGuardia's "clear proof" rule. How the Norris-LaGuardia rule became significant is not clear, itself, because when you are talking about national bargaining over the period of a decade you are talking about acts which are obviously authorized, particularly when the union's proof and briefs go into detail showing how all the steps taken on these national contracts were duly approved by scale committees and conventions.

C. The Opinion of the Court of Appeals

With all of this the Court of Appeals agreed. That Court felt that the Trial Court's opinion was "exhaustive" and it is clear no new considerations were added from the record.

The Court of Appeals is not as explicit as the Trial Court in dealing with the prior opinions of this Court.

The Court of Appeals simply ignores the paragraph "second" of Mr. Justice Douglas' opinion and does not mention proof of effects and consequences of the conduct of those who made the national contracts.

The Court of Appeals does say that the opinion of Mr. Justice White was not supported by a majority of the Court, but fails to point out that on the remand the second trial was supposed to be consistent with that opinion (381 U.S. 672).

The Court of Appeals agrees with the District Judge that "intention of driving competitors out of business" is the essential ingredient and that this must be established by "clear proof." But the Court fails to point out how that "clear proof" rule can be a significant question in this case which concerns national bargaining over the period of a decade by an international union, whose participation in the bargaining and in the effects and consequences to the industry and to the country are beyond question.

STATEMENT OF FACTS

The "National Bituminous Coal Wage Agreement of 1950" as amended in 1951, 1952, 1955, 1956, 1958, is truly an industry-wide agreement and is unique in this respect. (2232a-2341a, 1670a, 816a, 1330a-1331a).

There is no authority in any district or local representative of UMW to permit or to make any change in the national contract negotiated in Washington by the international union. (689a-690a).

Since 1950 the terms of the industry-wide contracts have been fixed in negotiations between UMW and Bituminous Coal Operators Association (BCOA), a bargaining

unit that represented only a part of the industry (720a, - 721a, 1768a, 782a-787a, 792a-793a, 2136a). These amendments to the national contract steeply increased the labor costs in the coal industry (793a).

While the largest coal producers are able to make very substantial profits, the balance of the industry cannot absorb the extravagant costs of the national contract; the result is that the industry is being taken over by a few large combines of producers. The fact that the bulk of the industry loses money and that the industry as a whole is marginal is acknowledged by opposing counsel (1670a-1671a). The principal witness for the union from the industry, Mr. George Love, who headed the largest company, acknowledged that his company and the other of the two largest companies made combined profits in the range of $43,000,000 annually after satisfying the requirements of the national contracts, while the rest of the industry all put together suffers annual losses in the range of $12,500,000, after paying upwards of $105,000,000 simply as welfare fringe benefits annually under the national contract (1790a-1794a).

The welfare fringe benefits imposed by the national contracts is enormously greater than that in any other industry, but the resulting unemployed get no benefits (1250a, 1222a-1223a).

Since 1950, great combines are being formed in the coal industry and these combines are able to make savings which enable them to operate profitably (809a, 945a, 1789a, 1867a-1868a).

The national wage contracts since 1950 were tailored to fit the new technology of intensive mechanization in mining, which the major combines, favored by geology and better mining conditions as well as by financial

strength, have been able to attain far better than the smaller production units (806a-807a, 1774a, 949a-951a, 952a, 948a-949a, 1041a). Two-thirds of the men have been forced out of the industry in the period of 1950-1959 (1451a, 2287a).

The economic plight of many coal-producing areas is well known. It has received priority attention from Congress and the President. The blighted coal towns suffer severe hardships, even actual starvation. The men in these blighted areas face these hardships waiting hopefully for jobs in the mines. Eventually, those who can, move away in search of new employment in other areas. The loss of these men to the coal industry is a critical one. It takes years to train a modern coal miner. This loss constitutes a weakening of a basic industry that is essential for the economic strength of the country (1797a-1798a).

Special studies have been made by the State of Tennessee with respect to the problem of unemployment in the coal fields of Tennessee. This has been a constantly growing problem since 1950 (1108a-1111a).

The Trial Court found that the small producers in the Tennessee field, including these petitioners, were not able to comply with the National Bituminous Coal Wage Agreement (167a).

But this experience of these petitioners in the Tennessee coalfields were not limited to these companies alone. The Trial Court has found facts which indicate the difficulty of operating in the Tennessee fields under the national contract (176a, 195a, 206a). At the southern end of the state, the entire Southern Tennessee field had been on strike for four years at the time of the trial of this case, because the operators could not, or would not, sign

the National Bituminous Coal Wage Agreement (1530a, 1897a-1899a).

With respect to companies beside these petitioners situated in the upper East Tennessee fields, the most modern underground producer in the state could not operate profitably under the national contract (1137a-1145a, 2244a-2250a), and the most efficient surface mining operator could not comply with the national contract, attempting to use the larger type stripping equipment (333a, 363a-365a, 369a-371a).

The organized industry of Tennessee (meaning those larger companies or mines which were represented by one of the larger operator associations that previously dealt with UMW in signing national contracts), has completely disintegrated since 1950. The larger East Tennessee mines were represented by Southern Appalachian Coal Association which was a member of Southern Coal Producers Association. None of the petitioners belonged to those associations. Those companies and mines which had belonged to the organized associations have gone out of existence except the two mines owned and operated in Tennessee in the period of this case by major producers, Consolidation Coal Company and the Pittston Company (1117a-1118a, 1886a-1894a, 1113a-1118a).

As demonstrated by witnesses on both sides, what is left in Tennessee is a number of small companies, usually operated by members of a family, whose company names constantly change and these mines are giving employment to previously unemployed coal miners of the region (1107a, 1533a, 1933a-1934a). The numbers of these smaller mines have actually increased as the larger mines, employing relatively large numbers of men, passed out of existence and the employees of these larger mines went

over to the smaller mines to obtain employment (1092a, 2057a-2058a).

UMW not only knows of the plight of the large number of smaller companies that struggle for survival through UMW's organizing drives, but since 1950 UMW has taken the attitude that the industry would be better off without them —"they are just a drag on the industry" (812a).

Bituminous Coal Operators Association (BCOA), the unit which negotiated these national contracts, was organized by Mr. George Love in 1950. Mr. Love was the head of the largest coal company, Consolidation Coal Company, and he obtained Mr. Moses to head up BCOA (1769a-1770a, 777a, 720a-721a). Mr. Love had an object of avoiding having his competitors pay a lower wage cost than his company paid (1784a). And this was true although he recognized that the natural conditions of the various fields were different with respect to the ability to attain a high productivity (1784a-1785a).

Subsequently, in 1955, the head of BCOA, Mr. Moses, made a statement, which was *quoted in the official journal of UMW*, concerning the relationship of BCOA to the union and the purposes of BCOA. He stated that BCOA was established to attain economic stability in the industry and had made it possible for two men to sit down and bargain for national contracts and had made possible "swift and effective handling of national problems on an authoritative bases." He stated that "perfect stability is an attainable goal and that the coal industry has taken long steps in that direction" (789a-792a).

THE PROTECTIVE WAGE CLAUSE

The Protective Wage Clause is set forth herein as Schedule A at the end of this petition. It is also found at 794a-799a and at 2242a et seq.

In 1958 the demand for coal declined sharply and the average price dropped from its highest amount of $5.08 in 1957 to $4.86 in 1958 (2287a).

In negotiations with BCOA for the 1958 national contract amendment, UMW sought to tighten up the contract provisions boycotting non-complying producers as previously contained in the so-called Land-Lease Clause of the 1952 amendment. On the other hand, according to UMW's theory and the evidence, coal company representatives were complaining to UMW about there being a lack of enforcement or application of the contract to some production (121a, 1403a).

UMW Counsel characterized the resulting Protective Wage Clause of the 1958 Amendment as a "quid pro quo" (2143a, 2185a-2186a). The introductory paragraph of the clause reads:

> "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows."

It is to be borne in mind that this provision amended the 1950 National Bituminous Coal Wage Agreement and

UMW and BCOA, in working up this clause in 1958, were fixing in writing the express duties of UMW with respect to the 1950 National contract.

UMW and BCOA exchanged drafts of the proposed Protective Wage Clause in November of 1958. UMW was demanding that BCOA agree to provisions which would require all signatories to refuse to buy or handle at all any non-complying tonnage. (This requirement became Paragraph B of the Clause.) In exchange for this enforcement of the operators' "duties" and in response to the demands of the negotiating operators, UMW was willing to express in the clause its "commitment" to see that the contract was observed by all. This is according to the testimony of Mr. Hopkins, Senior Counsel for UMW, who testified that Paragraph A of the Protective Wage Clause was the part demanded by the operators (2185a-2186a).

Thus, in exchange for the boycott agreed to by BCOA, contained in Paragraph B, UMW, in Paragraph A, agreed:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto" (2242a).

Paragraph B of the Protective Wage Clause required signatory operators to boycott coal produced without compliance with the national contract (2242a).

Paragraphs C and E of the Protective Wage Clause established a "Joint Industry Contract Committee" and "Joint District Contract Committees" to act as tribunals composed of industry and union representatives to try UMW, its agents, or any operator for violations of the duties contained in the Protective Wage Clause (2242a-2243a).

Paragraph D required UMW to report and list to the Contract Committees the names of the operators "whose operations are under contract with the union." A signatory operator was not subject to trial for buying or dealing in coal produced by any operator on this list reported by the union unless that operator had previously been found not in compliance with the contract (2242a-2243a).

Paragraph E required UMW to make available to the Contract Committee "all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal," and to make its appearance before the Committee on request in case of investigation of alleged violations of the Protective Wage Clause (2243a).

UMW and BCOA lawyers are presently engaged in defending this clause in an NLRB case based on violation of labor law. They appear to be having success. Antitrust law is not involved in that case. (See *Lewis v. NLRB*, 350 F.2d 801).

As the Trial Court found, it was the 1958 amendment, containing the Protective Wage Clause, that UMW was attempting to apply to the East Tennessee coal field in 1959, when a wave of violence broke out. The Tennessee operators balked at signing this contract and there resulted months of mine closures, dynamitings and shootings and several of our clients were heavily damaged (243a,

248a-249a, 296a, 342a, 374a-375a, 493a). The joint efforts of the Tennessee operators to negotiate a practical contract with the union met with demands to sign the national contract or nothing (375a-376a, 380a-381a).

REASONS FOR GRANTING THE WRIT

1. The lower court decisions reject the law of the case contained in this Court's prior opinions upon which the remand was based.

2. This is the case of first impression on the application of antitrust law to industry-wide bargaining; the lower courts have supplanted rules laid down by this Court on this question in this case with a different set of rules.

3. Industry-wide bargaining is a potent factor in our economic order; it has a natural tendency to favor the dominant units of an industry who negotiate the contracts over the smaller and weaker units who follow along behind; it tends toward concentration and oligopoly; practical and workable principles under antitrust law regulating industry-wide bargaining must be retained or competition will perish; the rules which the lower courts have substituted in this case are patently not workable.

4. Unchallenged and unchecked industry-wide bargaining has contributed more than any other factor to an inflationary wage-price spiral that threatens our free enterprise system; the Joint Economic Committee of Congress has repeatedly warned of this threat and has urged that all federal policies must concentrate and be focused upon the preservation of competition and the stopping of the merger tide; the rules laid down by the lower courts allow a large union and large employers to engage in practices that run in the directly opposite direction (See 1967 Joint Economic Report, Pages 25-26, 90th Congress, 1st Session, Senate Report No. 73).

5. Industry-wide bargaining goes beyond multi-employer bargaining, voluntarily arrived at; it forces impractical conditions on a large segment of the business community without giving a chance to speak or choose; fundamental national labor policy is well set in favor of bargaining unit by unit; antitrust policy is well set against any practice which unreasonably restrains trade; national employment policy set forth in the Employment Act (15 USC 1021) is centered upon preserving competition as the best way to further employment.

CONCLUSION

For the reasons assigned, petitioners pray that the writ of certiorari be granted to review the decision and the judgment of the United States Court of Appeals for the Sixth Circuit entered in cases No. 17,445 through 17,451, on September 11, 1968.

Respectfully submitted,

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SCHEDULE A

PROTECTIVE WAGE CLAUSE

The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under

terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained,

shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for

use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other employees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District

President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose operations are under contract with the Union. No operator may be found to be in violation of this Protective Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the Joint Industry Contract Committee that such Operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final

determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to the subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.